IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1192

HAROLD BROWN,
Secretary of Defense, *et al.*,

Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE AND BRIEF OF REUBEN B. ROBERTSON III, *AMICUS CURIAE*, SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI AND URGING THE COURT TO ORDER BRIEFING OF A JURISDICTIONAL ISSUE NOT CONTAINED IN THE PETITION

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MOTION OF REUBEN B. ROBERTSON III FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

On November 2, 1973, the *amicus curiae*, Reuben B. Robertson III, made a request of petitioners under the Freedom of Information Act for documents submitted by one of the respondents herein, General Motors Corporation. That request was the direct cause of an action brought by General Motors to enjoin the release of the requested documents, and the judgment in that action

against petitioners and in favor of General Motors is one of those on which certiorari is sought. Thus, but for the request of *amicus*, there would have been no lawsuit, and hence that part of the petition would never have been brought before this Court.

Despite the direct interest of Mr. Robertson in the outcome of the action brought by General Motors, no party in that action, and neither the District Court nor the Court of Appeals, ever sought to join him as a party pursuant to Rule 19 of the Federal Rules of Civil Procedure. Therefore, he brought his own action under the Freedom of Information Act, naming the petitioners as well as General Motors as defendants. Such a course of action was particularly appropriate in this instance, since the petitioners had agreed to release only a portion of the documents requested and, therefore, it was apparent that his interest could not be adequately represented by petitioners.

The lack of adequate representation of Mr. Robertson's interest has continued to this Court. Petitioners, who are nominally on the side of the requester, have once again failed to assert that General Motors erred in not joining him as an indispensable party as required by Rule 19. Although this Court could, on its own motion, direct the parties to brief the applicability of Rule 19, the attached *amicus* brief, which is directed solely to that question, should aid the Court in its consideration of that issue.

The consents of the petitioners and of General Motors, the only party respondent with an interest in this issue, have been sought. Both petitioners and General Motors have declined to consent to the filing of the brief.

Petitioners did not decide to seek review of the decision below until shortly before they filed on February 28, 1977. *Amicus* promptly obtained a copy of the petition and has attempted to file as soon as possible after reviewing the petition and determining whether to seek review of the additional question presented in its brief.

WHEREFORE, it is respectfully requested that the accompanying brief *amicus curiae* of Reuben B. Robertson III, urging the Court to order the petitioners and General Motors to brief the additional jurisdictional issue of the applicability of Rule 19 to the action instituted by General Motors, be permitted to be filed.

Respectfully submitted,

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Dated: March 18, 1977

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BRIEF OF REUBEN B. ROBERTSON III, *AMICUS CURIAE*, SUPPORTING THE PETITION AND URGING THE COURT TO DIRECT THE BRIEFING OF A JURISDICTIONAL ISSUE NOT CONTAINED IN THE PETITION.

The *amicus curiae*, Reuben B. Robertson III, supports the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. This brief sets forth an additional ground for reversing that portion of the judgment involving the action brought by the

respondent General Motors Corporation: the failure of General Motors to join *amicus* as an indispensable party, when it was his Freedom of Information Act request which triggered General Motors' suit to enjoin petitioners from releasing the requested records. That failure directly contravenes Rule 19 of the Federal Rules of Civil Procedure and is an error which this Court should notice and correct.

ADDITIONAL QUESTION PRESENTED

Did petitioners and General Motors, as well as both courts below, err in failing to join, as an indispensable party under Rule 19 of the Federal Rules of Civil Procedure, the person whose request to petitioners under the Freedom of Information Act directly triggered the action by General Motors seeking to enjoin petitioners from releasing the records in question?

INTERESTS OF *AMICUS CURIAE*

Amicus is the person whose request under the Freedom of Information Act led to the action brought by General Motors. The documents that he seeks are the subject of the action brought by General Motors against petitioners. His interests are described more fully in his accompanying motion for leave to file this brief and in the statement which follows.

RULE INVOLVED

Rule 19, Federal Rules of Civil Procedure

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be

considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

STATEMENT

As the petition plainly demonstrates, there are a number of difficult and important substantive issues involved in so-called "reverse" Freedom of Information Act cases. Accordingly, *amicus* urges this Court to give full consideration to them, and it supports the positions of the petitioners with respect to them. This brief is submitted with respect to a different issue, one which has never been raised by any party or by either court below: the failure of respondent General Motors to join or explain the non-joinder of *amicus* Robertson, even though it was

amicus who had requested the documents which are the subject of General Motors' action.[1]

The facts are simple and not in dispute. They are set forth in the opinions below (App. A and C to the petition) and in the only opinion in the separate action brought by the *amicus*, *Robertson v. Department of Defense*, 402 F. Supp. 1342 (D.D.C. 1975), which is set forth as an appendix to this brief (Appendix F). The events leading to the actions which are the subject of the petition began on November 2, 1973, when Mr. Robertson made a Freedom of Information Act ("FOIA") request of the petitioners for certain documents relating to the employment practices of General Motors regarding minorities and women. After considerable negotiation, and after advising General Motors of *amicus'* request, petitioners decided to release some but not all of the documents to *amicus*.

Thereafter, on April 10, 1974, General Motors brought an action against petitioners in the United States District Court for the Eastern District of Virginia, Alexandria Division, to prevent such release, but its complaint neither named *amicus* as a party nor explained why he was not

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[1] In another of the consclidated cases which are the subjects of this petition, the requesting party (the Legal Aid Society of Alameda County, California) was also not joined in the suit brought by Westinghouse Electric Corporation. However, the Society intervened in the district court and participated below, thereby rendering the question presented by *amicus* moot with respect to that action. In the third of these cases, brought by the United States Steel Corporation, the requester has, as far as *amicus* is aware, neither sought to intervene nor brought an independent action for the documents.

joined. Although *amicus'* residence and office are across the Potomac River from the courthouse in Alexandria, and although service of process pursuant to Rule 19 would have been authorized by Rule 4(f) of the Federal Rules of Civil Procedure, General Motors failed even to notify *amicus* of the action. *Amicus* first learned of the Virginia action from a letter sent by petitioners on April 19, 1974, seven days after General Motors had obtained a temporary restraining order enjoining petitioners from releasing the civil rights documents that they had previously determined should be released to Mr. Robertson. While petitioners did seek unsuccessfully to have the action transferred to the District of Columbia, they at no time moved under Rule 12(b)(7) to have the action dismissed for failure to join *amicus* pursuant to Rule 19, nor moved to require General Motors to explain the nonjoinder as required by Rule 19(c).

Amicus recognized that if "reverse FOIA" plaintiffs such as General Motors could determine the choice of forum by suing in Virginia, thus forcing requesters to intervene or lose their right to be heard, the reverse FOIA plaintiffs could just as well bring their next action in Detroit or New York or some even more inconvenient place. Indeed, in the other cases that are the subject of the instant petition, Westinghouse and United States Steel Corporation sued in Virginia, while the requesters resided in California and Pennsylvania, respectively. Thus, for *amicus* to have intervened in Alexandria would have required him to surrender the broad choice of forums which Congress expressly granted to requesters under the FOIA, 5 U.S.C. § 552(a)(4)(B). Therefore, on April 26, 1974, he filed his own complaint in the United States District Court for the District of Columbia, naming both petitioners and General Motors as defendants.

The action brought by General Motors proceeded to judgment in Virginia on September 20, 1974, and the Fourth Circuit stayed the portion of the order which permitted the release of some of the documents requested. Over two years later, on September 30, 1976, the Court of Appeals issued its decision, holding for respondents on all claims, and the Government's petition followed.

Meanwhile, in the District of Columbia, General Motors sought summary judgment, claiming that the court in Virginia had exclusive jurisdiction over the documents, that principles of comity precluded the District of Columbia case from proceeding, and that, since a judgment had been entered in Virginia, collateral estoppel was a bar. On June 19, 1975, District Judge Barrington Parker denied the motion of General Motors in its entirety, and in addition granted *amicus* Robertson's motion for partial summary judgment with respect to two of the defenses raised by General Motors. App. F. at 10a, 14a. *Amicus* does not seek review of any of the issues resolved in that action, which has not yet proceeded to judgment. What he does seek is review of the failure of respondent General Motors to join him in the Virginia action pursuant to Rule 19, the failure of petitioners to move pursuant to Rule 12(b)(7) to require such joinder, and the failure of the courts below to invoke Rule 19 on their own as they are plainly entitled to do.[2] The result of these successive failures has

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[2] *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (hereinafter "*Provident*"); *Hoe v. Wilson*, 76 U.S. (9 Wall.) 501, 504 (1870); *Boles v. Greenville Housing Authority*, 468 F.2d 476, 479 (6th Cir. 1972); *Brown v. Christman*, 126 F.2d 625, 632 (D.C. Cir. 1942); *Advisory Committee Notes to Rule 19*, 39 F.R.D. 88, 93.

been, and continues to be, a duplication of actions involving an identical controversy, with all of the parties present only in the action brought by *amicus* in the District of Columbia, and with *amicus*, the only person with a direct interest in disclosure, having been excluded from the Virginia action which is now before this Court.

REASONS FOR GRANTING THE WRIT

THE QUESTION PRESENTED BY *AMICUS* IS AN IMPORTANT ONE THIS COURT SHOULD RESOLVE

According to the petition (p. 11 n.15), during 1976 alone, at least 78 reverse FOIA cases were brought seeking to preclude the release of documents which a federal agency desired to make public. Rarely, if ever, were requesting parties joined in such cases. The failure of reverse FOIA plaintiffs such as General Motors to name the requesting party as a defendant, or to explain why joinder was not made as required by Rule 19(c), is readily understandable, but not defensible. Reverse FOIA plaintiffs have no incentive to join requesting parties who have a direct interest in obtaining the documents, particularly since many agencies, including one of the petitioners here, view their role as being "basically a stake holder" (App. G at 16a, *infra*). Moreover, in situations such as this, where petitioners agree with General Motors that portions of the documents need not be released, the failure to add the requesting party permits the dispute to be narrowed, and hence the Government as well as reverse plaintiffs may gain by not joining the injured requester.

The failure to join the requesting party also permits the plaintiff in reverse FOIA cases far greater latitude

in forum shopping, since only a federal agency is a defendant. *See* 28 U.S.C. § 1391(e). For example, in these cases, Westinghouse brought suit in the Eastern District of Virginia when the requesting party was the Legal Aid Society of Alameda County, California. Inconvenient forums are always a problem, but their difficulty is exacerbated by the fact that in most reverse FOIA cases a temporary restraining order and then a preliminary injunction is sought, thus requiring the requester to obtain counsel in the distant forum immediately if he wishes to protect his interests, assuming that he is fortunate enough to learn of the action in time.

Another example of the problem is illustrated by the situation in which ten television manufacturers filed separate reverse FOIA actions in four separate jurisdictions in an effort to stop the Consumer Product Safety Commission from releasing data on accidents caused by color television sets; in none of them were the requesting parties joined. Even after all ten cases were consolidated in the District of Delaware, no attempt was made by the defendant or the court to bring in the requesters pursuant to Rule 19.[3] There, as in *Robertson*, an action was commenced in the District of Columbia where all of the parties could be properly joined, and where all of the safety reports in question had been initially filed by the reverse FOIA plaintiffs. That action was dismissed on grounds of non-justiciability, with the district court concluding that, because the agency had agreed that disclosure was required by the FOIA, there was no case or controversy although the agency still refused to release the records because of the pending actions in Delaware. *Consumers Union v.*

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[3] *See GTE Sylvania, Inc. v. Consumer Product Safety Comm.*, 404 F. Supp. 352 (D. Del. 1975).

Consumer Product Safety Comm., 400 F. Supp. 848 (D.D.C. 1975), *appeal argued*, No. 75-2059 (D.C. Cir., Sept. 21, 1976). One of the issues raised on that appeal is the applicability of Rule 19 to the cases in Delaware, the same issue which *amicus* asks this Court to consider here.

In almost every reverse FOIA case, plaintiffs are corporations for which money is little, if any, object and the requesters are private citizens or small public interest organizations in no position to retain counsel to represent their interests around the country. Such disparity is particularly likely to occur in situations such as this where equal employment documents are at issue. Given the fact that reverse FOIA actions are apparently maintainable in the corporation's state of incorporation, its principal place of business, where the documents are located, or in the District of Columbia, the invitation for forum shopping is great, and it can readily be used to disadvantage requesting parties unless some form of relief is provided.

Many requesting parties are left with little choice but to rely upon the government to defend them. Others, like *amicus*, are not deterred and have brought their own lawsuits, thereby adding another case to federal court dockets. Since the law is clear that, in a situation such as this, the requesting party cannot be denied its right to challenge the validity of the withholding in some court at some time,[4] it is apparent that the failure of General

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[4] *Hanson v. Denckla*, 357 U.S. 235, 249-50, 254-55 (1958); *Western Union Telegraph Co. v. Commonwealth of Pennsylvania*, 368 U.S. 71, 75 (1961); *Provident*, *supra*, 390 U.S. at 110; and *Advisory Committee Notes to Rule 19*, 39 F.R.D. at 89.

Motors to join all parties, including *amicus*, in a single action will inevitably lead to more rather than less litigation.

The solution is quite simple, although it was neglected by the parties and the courts below. Rule 19 requires the joinder of additional parties whose interests may be significantly affected in a pending action. It is a flexible rule which enables the courts to insure that justice is done and which protects the interest of the public "in avoiding repeated lawsuits on the same essential subject matter." *Advisory Committee Notes to Rule 19*, 39 F.R.D. at 91. Especially when coupled with the transfer provisions of 28 U.S.C. § 1404(a), and the liberal venue provisions of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), there will remain few if any problems of joinder that Rule 19 cannot solve. By utilizing Rule 19, the result will be one rather than two lawsuits, but without it, only this Court can resolve those cases in which there are two or more directly conflicting orders regarding the disclosure of an agency's records. *See Robertson v. Department of Defense*, *supra*, App. F at 7a.

Although the merits of the Rule 19 question were not addressed below, the facts on which a determination needs to be made are clear and fully capable of resolution by this Court. Without passing on the applicability of subsection (a)(1), it is apparent that under both subdivisions (i) and (ii) of Rule 19(a)(2), joinder is required if feasible. If, as is the case here, there is proper subject matter jurisdiction under the original complaint against the federal defendants, private parties, such as *amicus*, can be joined under Rule 19 without a further basis of subject matter jurisdiction. *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971). In addition, *amicus*, whose residence and business office are in Washington,

D.C., is well within 100 miles from the courthouse in Alexandria, and thus service on him can be made pursuant to Rule 4(f). And if venue were contested, *amicus* could be dismissed or, more properly, the action could be transferred under section 1404(a) to a place of proper venue.[5]

In other cases, a reverse FOIA plaintiff may not be able to obtain personal jurisdiction under Rule 4(f) in the forum in which the action is brought and thus will have to refile elsewhere. Theoretically, there may be cases where all parties cannot be brought before any court – an unlikely prospect with the government as the other defendant – and the court would then have to decide under the "equity and good conscience" standard of Rule 19(b) whether the case should proceed without the requester or be dismissed. In making such a determination, it will be guided by the "stated pragmatic considerations," *Provident, supra,* 390 U.S. at 107, which are set forth in the four criteria of Rule 19(b). Of course, this Court cannot decide a series of future Rule 19 cases in the context of this petition, but what it can do, and what *amicus* urges it to do, is to require the parties to brief the applicability of Rule 19 to reverse FOIA actions such as this, in which the known requesting party is not joined and the complaint fails to include any explanation of why joinder did not take place. This issue is of increasing importance to the

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[5] One of the principal reasons for non-intervention in this case was a concern on the part of *amicus* that upon intervention, there might be no opportunity to move to have the action transferred to the forum of his choice (the District of Columbia), since some courts have denied a party electing to enter a lawsuit through intervention the right to move to transfer. *See, e.g., Commonwealth Edison Co. v. Train,* 71 F.R.D. 391, 394 (N.D. Ill. 1976).

federal courts, and a determination of it by this Court can greatly simplify the procedures in reverse FOIA cases and can provide clear and meaningful guidelines for the parties and the courts in what has become an increasingly complex field of federal litigation.

CONCLUSION

For all of the foregoing reasons, *amicus* Reuben B. Robertson III urges that this Court grant the petition for a writ of certiorari and include as a question presented the applicability of Rule 19 to the action brought by respondent General Motors against these petitioners.

Respectfully submitted,

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March 18, 1977

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REUBEN B. ROBERTSON III, *Plaintiff,* v. DEPARTMENT OF DEFENSE, JAMES R. SCHLESINGER, and GENERAL MOTORS CORPORATION, *Defendants.*	)	Civil Action No. 74-644

Before
BARRINGTON D. PARKER
UNITED STATES DISTRICT JUDGE

Decided: June 19, 1975

MEMORANDUM OPINION

This is an action brought under the Freedom of Information Act (FOIA or Act), 5 U.S.C. §552 (1970), in which Reuben B. Robertson, III, a private citizen, seeks to obtain access to certain civil rights compliance reports submitted by the defendant General Motors Corporation (GM) to the defendant Department of Defense. Also named as a defendant is James R. Schlesinger, Secretary of Defense.

By Executive Orders 10925[1] and 11114[2] a Federal policy was promulgated requiring companies contracting

[1] 26 Fed. Reg. 1977 (1961).

[2] 28 Fed. Reg. 6485 (1963).

with the United States Government to agree not to discriminate against an employee or applicant for employment because of race, color, religion, sex or national origin. The Department of Labor was designated by Executive Order 11246[3] to assure that contractors comply with their non-discrimination contract commitment. Under regulations issued by the Department of Labor each government contracting agency is primarily responsible for obtaining compliance.[4] Within the Department of Defense, the Director of the Defense Supply Agency (DSA) and more particularly the DSA Office of Contract Compliance bears this responsibility subject to the Department of Labor regulations. Among these regulations are provisions requiring government contractors to submit compliance information and reports to the contracting agency. These include annual reports on Standard Form 100 (EEO-1's)[5] and Affirmative Action Plans (AAP's).[6]

The plaintiff seeks injunctive relief, compelling disclosure of documents submitted by GM to the Department of Defense: the 1973 EEO-1's and AAP's for facilities located in Bedford, Indiana and Danville, Illinois.

The issues presently before the Court are: (1) whether the proceedings in a similar action filed in the United States District Court for the Eastern District of Virginia, which are summarized *infra*, involving the same documents, require entry of summary judgment in favor of GM, and, if not, (2) whether plaintiff Robertson is entitled to par-

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3 As amended, 3 C.F.R. 169 (1974).

4 41 C.F.R. § 60-1.6 (1974).

5 41 C.F.R. § 60-1.7(a) (1974).

6 41 C.F.R. Parts 60-2 and 60-60 (1974).

tial summary judgment on the grounds that the documents are not, as urged by GM, within the scope of the third and sixth exemptions of the FOIA, 5 U.S.C. §552 (b)(3) and (6). General Motors has filed a motion for summary judgment and the plaintiff has filed a cross-motion for partial summary judgment. For reasons set forth in this opinion, the Court concludes that GM's motion for summary judgment should be denied, and Robertson's motion for partial summary judgment should be granted.

On November 2, 1973 plaintiff first requested copies of the above documents from the DSA. There then ensued correspondence between the DSA and GM and the DSA indicated its intention to make certain portions of the documents available to the plaintiff.

Shortly thereafter, on April 10, 1974, GM filed suit against the Department of Defense, the Defense Supply Agency, the Office of Federal Contract Compliance and the Department of Labor in the United States District Court for the Eastern District of Virginia seeking an injunction against disclosure of the documents.[7] In that action GM claimed that the documents were exempt from disclosure under the fourth exemption of the Act as "matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential."[8] General Motors further claimed that the documents were exempt from disclosure under 42 U.S.C.

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7 General Motors Corp. v. Schlesinger, et al., C.A. No. 195-74-A (E.D. Va., filed Apr. 10, 1974).

8 5 U.S.C. § 552(b)(4).

§2000e-8(e) and 18 U.S.C. §1905.[9] On April 12, 1974 that court issued a temporary restraining order against the defendants, directing them not to release any portions of the documents. Approximately a week later Robertson learned of the Virginia action, but made no attempt to intervene. Instead, on April 26, 1974, he filed the FOIA proceeding in this Court.

A preliminary injunction was issued by the Virginia court on May 9, 1974. Later, on December 20, 1974 a decree of permanent injunction was entered enjoining the defendants from releasing certain portions of the documents. The court found that those portions fell within the fourth exemption of the FOIA and were protected from disclosure by 18 U.S.C. §1905. On February 27, 1975 the United States Court of Appeals for the Fourth Circuit, expressing no views on the merits, issued a stay pending appeal directing the defendants not to release any portions of the documents.[10]

The federal defendants in this action have taken the position that certain portions of the documents are confidential commercial or financial data which, if released, could injure GM's competitive position and are exempt from disclosure under the fourth exemption. Other portions would be disclosed were it not for the Virginia injunction. These defendants have not taken any position on the two motions presently before the Court—that of

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9 42 U.S.C. § 2000e-8(c) makes unlawful disclosure by employees of the Equal Employment Opportunity Commission of certain confidential information.

10 General Motors Corp. v. Schlesinger, No. 75-8059 (4th Cir., stay entered Feb. 27, 1975).

GM for summary judgment and Robertson for partial summary judgment.

MOTION OF GENERAL MOTORS FOR SUMMARY JUDGMENT

A multi-pronged argument is launched by GM to support the summary judgment motion: (1) exclusive jurisdiction; (2) comity; and (3) collateral estoppel.

Exclusive Jurisdiction

General Motors advances the argument that the Virginia District Court, having first exercised jurisdiction over the question of access to the documents, has sole and complete jurisdiction. Such an argument depends entirely, however, on analogizing the Virginia and District of Columbia proceedings to actions in rem or quasi in rem. In such proceedings the governing principle is that the court having custody and control over the property or res may proceed to grant the appropriate relief. And where two courts attempt to exercise in rem or quasi in rem jurisdiction over the same property the doctrine provides that the court first acquiring jurisdiction proceeds without interference from the other. *Princess Lida v. Thompson,* 305 U.S. 456 (1939); *United States v. Bank of New York & Trust Co.,* 296 U.S. 463, 477 (1936), and cited cases.

A proceeding in rem is traditionally regarded as one taken against the property itself for the purpose of disposition among contesting claimants. But in this proceeding Robertson is not asserting any right, title or possessory interest in the requested documents. Rather, he seeks only access to and review of them under the Act and

injunctive relief to secure those results against the defendants over whom this Court has jurisdiction. This proceeding is not one in rem, and where the judgment sought is in personam and an injunction is requested compelling or restraining action by a defendant, federal courts having concurrent jurisdiction may proceed until a final determination in one court affords the possible defense of res adjudicata. *Penn General Casualty Co. v. Pennsylvania,* 294 U.S. 189, 195 (1935).

The Court finds no support for and therefore rejects GM's argument that exclusive jurisdiction is with the Virginia court.

Comity

General Motors also contends that the principle of comity requires this Court to abstain from entertaining this action, as to do so would interfere with the jurisdiction of the Virginia courts. Upon analysis, however, this contention should be rejected. .

As stated in *Great Northern Railway Co. v. National Railroad Adjustment Board,* 422 F.2d 1187, 1193 (7th Cir. 1970):

> [T]he comity doctrine . . . requires that when two *identical* actions are filed in courts of concurrent jurisdiction the one which first acquired jurisdiction should be the one to try the lawsuit. The purposes of the rule are to avoid unnecessarily burdening courts and to avoid possible embarrassment from conflicting results.

> Technically, the concept of comity has no application in cases like the instant one in which the two pending suits involve *different parties, different causes of action, and different issues.* (Added emphasis).

First, it is clear that identity of parties is lacking between the present and the Virginia proceeding. Likewise, there is a difference in the factual and legal issues. Plaintiff in this action seeks access to all portions of the documents. He asserts a claim to the documents claiming that exemptions three, four and six in the FOIA do not apply. However, in the Eastern District of Virginia proceeding the issues involved the third and fourth exemptions and the permanent injunction of December 20, 1974 was predicated on only the fourth exemption. The federal defendants in that proceeding challenged on a limited basis General Motors' attempt to obtain an injunction and agreed that certain portions of the documents were exempt from disclosure under exemption four of the Act.

Since this Court finds in its discussion of the collateral estoppel issue, *infra,* that plaintiff's interests were not represented in the Virginia court, it necessarily follows that the comity argument is without merit.

Any danger that the Department of Defense could find itself the object of inconsistent injunctions can be mitigated through the use of stays pending final determination of the legal issues. *Cf. Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939).

Collateral Estoppel

The final basis of GM's summary judgment motion is that Robertson's suit is barred by collateral estoppel, the

issues now presented having been resolved against him in the Virginia action.

Central to the argument is the claim that Robertson's interests were represented adequately by the government in the Eastern District action. Arguing that "it is old law that a governmental body may represent its citizens in litigation, and that a judgment against that governmental body is as conclusive on the citizen as it would have been had they been parties of record," GM refers to two turn-of-century state court decisions. *Healy v. Deering*, 83 N.E. 226 (Ill. 1907); *People v. Holladay*, 29 P. 54 (Cal. 1892).

These cases held that where the state's claim of ownership of real property has been rejected in court, a private citizen cannot thereafter sue, as representative of the public, for a declaratory judgment that the property is publicly owned. However, they are so clearly distinguishable from the situation now before the Court as to require little comment. The parties are not disputing ownership of anything, let alone real property. Robertson is not suing as a representative of the public, but is asserting a purely personal right bestowed upon him by the FOIA.

The other authority summoned is *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944), cited to "illustrate the principle of government representation." There, our Court of Appeals permitted adjoining landowners to intervene for the purpose of appealing from a district court judgment setting aside a zoning order. While the opinion suggests that a government agency may sufficiently represent individual citizens so as to bind them by a judgment, close analysis indicates that *Wolpe* is not concerned essentially with collateral

estoppel but rather the question of intervention. As it then read, Rule 24(a), F.R. Civ. P., required that the intervening party show that he would be "bound by a judgment in the action." The appellate court focused on the obvious proposition that "a decree setting aside a zoning order" would bind the landowners to the extent that it would deprive them of their statutory right[11] to sue to enforce the order. 144 F.2d at 507. The problem the court was faced with—*viz.* permitting parties with a real interest to intervene—was alleviated when Rule 24(a) was amended in 1966 to eliminate any reference to the intervenor's being bound by the judgment. As the Advisory Committee Note to the 1966 amendment states: "[The amendment] frees the rule from undue preoccupation with strict considerations of res judicata."

The Court therefore finds no support in the cases cited by GM for the view that the government was Robertson's legal representative in the Virginia action, so as to subject him to collateral estoppel. Furthermore, the Court finds little support in logic or experience for the argument that in this type of litigation, where GM has obviously sought a forum of its choice, that a private citizen's interests are represented by the government in a suit involving disclosure of information. Indeed, the history of the FOIA clearly reflects that in this area the government's and the citizen's views have rarely coincided.[12] And more particularly, in the Virginia proceeding and in the matter before

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[11] Under 5 D.C. Code § 422 (1973).

[12] *See*, Senate and House Reports on the FOIA. S. Rep. No. 813, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966).

this Court the government has never taken the position espoused by Robertson—that the documents, in their entirety, are obtainable under the Act. Therefore, the Court concludes that Robertson was not represented by the Federal defendant in the Virginia action and cannot be subject to collateral estoppel. The three grounds asserted in GM's motion for summary judgment are lacking in merit and are rejected.

MOTION OF ROBERTSON
FOR PARTIAL SUMMARY JUDGMENT

We turn now to a consideration of two defenses asserted by General Motors which they argue preclude plaintiff's attempted access to the documents: first, that the documents cannot be disclosed because they are protected by other statutes, exemption three of the Act; second, that the documents contain data which if disclosed would constitute an unwarranted invasion of personal privacy, exemption six of the Act. As to these arguments the plaintiff Robertson asserts that as a matter of law he is entitled to partial summary judgment.

The Third Exemption

General Motors contends that disclosure of the information sought by the plaintiff is prohibited by the third exemption of the Act, §552(b)(3), which provides that the FOIA ". . . does not apply to matters that are—specifically exempted from disclosure by statute." In support of this position it relies upon two federal statutes: §709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-8(e), which applies criminal penalties against officers of the Equal Employment Opportunity Commission

for unauthorized disclosure of documents; and §1905 of Title 18 of the Criminal Code which proscribes the disclosure of confidential statistical data, amount or source of any income, profits, losses, or expenditures of any corporation by government officials or employees.[13]

But the precise arguments advanced by GM as to these statutes have only recently been rejected by this Circuit in *Sears, Roebuck & Co. v. General Services Administration,* 509 F.2d 527 (D.C. Cir. 1974). In that case Sears sought to prevent disclosure of its EEO forms and AAP's and, in sustaining fully the District Court's ruling that neither statute applied, our Appellate Court, at page 529, observed:

> [T]he data in question . . . was not collected by the EEOC, nor was it obtained pursuant to EEOC authority. *Section 709(e) does not apply.* . . . This Court has indicated that *§1905 does not fall within the ambit of exemption (b)(3)* because it does not itself define what information is exempt from disclosure. Grumman Aircraft Engineering Corp. v. Renegotiation Board, 138 U.S. App. D.C. 147, 149, n. 5, 425 F.2d 578, 580 n. 5 (1970); Robertson v. Butterfield, 162 U.S. App. D.C. 298, 300, 498 F.2d 1031, 1033 n. 6 (1974). (Footnote omitted; emphasis added).

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[13] Section 709(e), a criminal statute, prohibits officers and employees of the Equal Employment Opportunity Commission from making public, information obtained by the Commission pursuant to its authority under Title VII. Section 1905 of 18 U.S.C. penalizes government employees who release trade secrets, statistical or financial data submitted to the government.

In addition, two District Court opinions from the Ninth Circuit involving AAP's and EEO-1's likewise found inapplicable §709(e) of Title VII. *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 295 (C.D. Cal. 1974); *Legal Aid Society of Alameda County v. Shultz*, 349 F. Supp. 771, 775-6 (N.D. Cal. 1972). These opinions have not been rejected or modified in any way by the appellate court of that circuit.

The Sixth Exemption

Section 552(b)(6) of the Act denies access to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." GM claims that since the documents constitute personnel files they are, therefore, exempt from disclosure.

It urges that the above provision should be read so as to exempt from disclosure *all* personnel files and that the further language of (b)(6)–"the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"–is not to be construed as qualifying "personnel files" but only "similar files." This is a distorted construction and GM candidly admits that the unwarranted invasion of privacy test has been held in this jurisdiction to apply to "personnel and medical files" as well as "similar files." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971); *Ackerly v. Ley*, 420 F.2d 1336, 1339–40 n. 3 (D.C. Cir. 1969).

Nor can GM successfully urge exemption from disclosure of the documents on the ground that such would constitute an unwarranted invasion of privacy. It does not appear that corporate privacy was embodied within

the provisions of the sixth exemption.[14] This result is supported by the legislative history to the original Act[15] and it may be clearly inferred from the opinions of this Circuit.[16]

In other contexts, courts have also rejected corporate claims to a right of privacy.[17] In *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), the Supreme Court stated:

> corporations can claim no equality with individuals in the enjoyment of a right to privacy. (Citation omitted). They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

Having considered the words "personal privacy" in their context, the legislative history of the sixth exemption, and the lack of any indication that Congress intended any significant departure from the traditional legal view of privacy, the Court finds that 5 U.S.C. §552(b)(6) recognizes no exemption based on a right of privacy in corporations.

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[14] *See*, K. Davis, *Administrative Law Treatise* § 3A.22, at 163-4 (Supp. 1970).

[15] *Supra*, n.12.

[16] *See: Rural Housing Alliance v. United States Dep't. of Agriculture*, 498 F.2d 73, 76-78 (D.C. Cir. 1974); *Getman v. NLRB, Supra. See also, Washington Research Project, Inc. v. Dep't. of HEW*, 366 F. Supp. 929, 937 (D.D.C. 1973), *modified*, 504 F.2d 238 (D.C. Cir. 1974).

[17] *See generally*, 62 Am. Jur. 2d *Privacy* § 11 (1972).

The Court has examined the AAP's and EEO-1's *in camera* and has found no references to identified employees of GM. The Court concludes therefore that disclosure of the documents would not "constitute a clearly unwarranted invasion of personal privacy."

Accordingly, partial summary judgment will be entered in favor of plaintiff as to the third and sixth exemptions.

Counsel for plaintiff is directed to submit a proposed order in conformity with this opinion within five days.

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

Dated: June 19, 1975

Appendix G

DSAH-G 1 November 1974

MEMORANDUM FOR DEPUTY GENERAL COUNSEL
DEPARTMENT OF DEFENSE

SUBJECT: Administrative Conference Study on Judicial Review of Federal Administrative Action

In response to your Memorandum of 10 October 1974 the following responses are provided to the questionnaire on judicial review of agency actions:

1. We are aware of no actions of the Defense Supply Agency that are reviewed in the first instance by courts of appeals. No court of appeals has exclusive venue with respect to any category of agency action.

2. Since January of 1974 this Agency has been a party to 49 actions in United States District Courts and 25 actions in the United States Court of Claims. In 1973 we were litigants in 21 actions in the District Courts and 25 actions in the Court of Claims. Available records go back to December of 1972 at which time we had 15 pending cases in the District Courts and 93 pending cases in the Court of Claims. No separate records are maintained on district court cases appealed to the courts of appeals as only a very small proportion of the case load is so appealed. One case in which the Agency is a party is currently in a court of appeals. The following is a summary of the types of cases filed since 1 January 1974 in Federal District Courts in which this Agency is a party:

a. Contract and procurement – 20,

b. Freedom of Information – 11,

c. Personnel action – 9,

d. Discrimination complaints – 7,

e. Patent and trade secret – 2.

A small but significant portion of these cases involved requests for injunctive relief. As may be seen from the foregoing breakdown almost all of our litigation involves problems common to many Federal agencies. District Court actions involving review of formal administrative records generally relate to personnel actions, discrimination complaints, and EEO contract compliance actions.

3. No actions of this Agency are subject to direct review in a court of appeals.

4. We do not recall any instances of intercircuit conflict in cases involving this Agency.

5. Only in cases seeking injunctive relief relating to the proposed release of information furnished this Agency by contractors under the EEO Contract Compliance Program have we been aware of forum-shopping. The reason appears to be that a particular district court has been more sympathetic to arguments of competitive harm advanced by plaintiff contractors seeking injunctive relief. In these cases the Agency is basically a stake holder as between the contractors and the member of the public seeking the information furnished to the Agency by the contractors. Thus, the forum-shopping has had little impact on the quality or efficiency of this Agency's operations.

6. Most of the patent infringement litigation and much of the litigation relating to trade secrets and technical data involve complex scientific or technical questions. While

the Court of Claims has trial judges with extensive patent and technical backgrounds, judges in the district courts are generally fully able to understand and handle these issues also.

FOR THE DIRECTOR:

/s/ Karl Kabeiseman
KARL KABEISEMAN
Counsel